

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

<b>IN THE MATTER OF</b>	)	
<b>THE PERMIT OF</b>	)	
	)	
<b>RIDGEWAY PETROLEUM, INC.</b>	)	<b>PERMIT NO. DL45-23052</b>
<b>2735 MAIN STREET</b>	)	
<b>HIGHLAND, INDIANA 46322</b>	)	
	)	
<b>Applicant.</b>	)	

**PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

The Applicant, Ridgeway Petroleum, Inc., 2735 Main Street, Highland, Indiana 46322, permit number DL45-23052 is the applicant for a type 115<sup>1</sup> Alcohol & Tobacco Commission (“Commission”) permit. The application was assigned to the Alcoholic Beverage Board of Lake County (“Local Board”). The Local Board held a hearing on June 7, 2007 and voted three (3) to one (1) to recommend denial of the application. The Commission adopted the Local Board’s recommendation on June 19, 2007.

The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on August 29, 2007 and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing (“LB Hearing”), the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), and contents of the entire Commission file (“ATC File”), now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

---

<sup>1</sup> Beer and wine (grocery) dealer located in an incorporated area. Ind. Code § 7.13-5-2(a).

## **II. EVIDENCE BEFORE THE LOCAL BOARD**

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
1. David Smith, Applicant.
- B. The following individuals testified before the Local Board against the Applicant in this cause:
1. Tom O'Donnell, Lake County Council; and,
  2. Christine Cid, Lake County Council.
- C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
1. None.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. None.

## **III. EVIDENCE BEFORE THE COMMISSION**

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
1. David Smith, Applicant; and,
  2. Jeff McKean, Attorney for the Applicant.
- B. The following individuals testified before the Commission against the Applicant in this cause:
- None.
- C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:
1. Findings of Fact and Conclusions of Law, *Kocolene Oil Corporation v. Indiana Alcoholic Beverage Commission*, Cause No. CV781-32 (1984);
  2. Findings of Fact, Conclusions of Law and Judgment, *The Pantry, Inc. v. Indiana Alcoholic Beverage Commission*, Cause No. 26C01-8901-CP0005 (1990);
  3. Letter from Commission Executive Secretary Daniel Steiner to local alcoholic beverage boards dated March 1, 1991;

4. Indiana Alcohol and Tobacco Commission Findings of Fact and Conclusions of Law, In re: Kocolene Marketing, LLC, Permit No.DL28-94299;
5. Indiana Alcohol and Tobacco Commission Findings of Fact and Conclusions of Law, In re: Mac's Convenient Store, Permit No.DL79-21223;
6. Indiana Alcohol and Tobacco Commission Findings of Fact and Conclusions of Law, In re: Casey's Enterprises, LLC, Permit No.DL34-20256 and Permit No. DL34-20253;
7. Indiana Alcohol and Tobacco Commission Findings of Fact and Conclusions of Law, In re: Casey's Enterprises, LLC, Permit No.DL84-20757;
8. Indiana Alcohol and Tobacco Commission Findings of Fact and Conclusions of Law, Mac's Convenient Store, Permit No.DL49-21244;
9. Indiana Alcohol and Tobacco Commission Findings of Fact and Conclusions of Law, In re: Smoke Shop II & IV, Inc., Permit No.DL46-21320;
10. Indiana Alcohol and Tobacco Commission Findings of Fact and Conclusions of Law, In re: American Oil Company, Inc., Permit No.DL49-18873 and Permit No. DL49-18879;
11. Indiana Alcohol and Tobacco Commission Findings of Fact and Conclusions of Law, In re: American Oil Company, Permit No.DL41-18884;
12. Photographs of interior of proposed permit premises;
13. Summary – Ridgeway Petroleum Inc. inventory and sales statistics;
14. Photographs of exterior of proposed permit premises;
15. Petition of customers desiring sales of alcoholic beverages at the proposed permit premises;
16. Summary of grocery store permits in Highland, Indiana;
17. Maps outlining distance to closest competitors;
18. Age Restricted Sales training documents; and,
19. Transcript – Lake County Local Board, June 7, 2007.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

None.

#### **IV. FINDINGS OF FACT**

1. The Applicant, Ridgeway Petroleum, Inc., 2735 Main Street, Highland, Indiana 46322, permit number DL45-23052, is the applicant for a type 115 Commission permit. (ATC File).
2. The Applicant maintains a reputation for decency and law obedience in the community in which it conducts business. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10. (ATC Hearing).
3. There is a need for the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(a). (LB Hearing and ATC Hearing).

4. The neighborhood and community desire to receive the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(b). (ATC Hearing).
5. The services of the Applicant at the proposed permit premises would have a positive impact on the neighborhood or community in which it is proposed to be located. 905 IAC 1-27-4(d). (LB Hearing and ATC Hearing).
6. The proposed permit premises is more than 200 feet from a church or school. Ind. Code § 7.1-3-21-11. (ATC File).
7. The Applicant sells milk, bread, meat, cereals, canned goods, condiments, boxed goods, salad dressing, pickles, soft drinks, coffee, pet foods, crackers, chips, juices, beauty aids, toiletries, cookies, paper products and dairy products and other items customarily found in a grocery store. (LB Hearing and ATC Hearing).
8. The proposed permit premises is not in a residential district as referred to in Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (LB Hearing and ATC Hearing).
9. The Applicant's current annual gross grocery sales are approximately One Million Fifty Seven Thousand Eight Hundred Eighty Eight Dollars (\$1,057,888.00). (LB Hearing and ATC Hearing).
11. The Applicant devotes seventy percent (58%) of its total floor space to food and grocery items. (LB Hearing and ATC Hearing).
11. A substantial portion of the business carried on or to be carried on at the proposed permit premises is in the nature of the Applicant's main business function as a grocery/convenience store. Ind. Code § 7.1-3-1-19. (LB Hearing and ATC Hearing).
12. The Applicant's business satisfies the "character of business" test. (LB Hearing and ATC Hearing).

13. There have been no tobacco related violations at the proposed permit premises since 2001. (LB Hearing and ATC Hearing).
14. The Applicant's stores are similar to stores of competitors holding alcoholic beverage permits in Indiana. (LB Hearing, ATC Hearing and ATC File).
15. The Applicant submitted in excess of sixty seven (67) signatures of persons ("Petition") in favor of the issuance of the permit and who frequent the business of the Applicant. (ATC Hearing).
16. Sixty four (64) signatures on the petition are from customers living within five (5) miles of the proposed permit premises. (ATC Hearing).
17. The only remonstrators were Lake County Council members who testified that the council passed a resolution objecting to sales of alcoholic beverages at gas stations. (LB Hearing).
18. The Local Board's proffered basis for denial of the permit on the Local Board Voting Sheet was (i) no need for services at this location; and (ii) no desire to receive services at the location. The weight of the evidence, however, contradicts that conclusion. (LB Hearing).
19. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

## **V. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.
2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.
3. The Commission is authorized to act upon proper application. *Id.*
4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).
6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).
7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.
8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).
9. The proposed permit premises are not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.
10. The proposed permit premises are more than 200 feet from a church or school. (ATC File). Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.
11. The Applicant is not disqualified from holding a Commission beer and wine grocery permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-15-2.
12. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

13. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*
14. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).
15. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
16. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
17. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
18. There is a need for a beer and wine grocery permit at the Applicant's location. 905 IAC 1-27-4 (a).
19. The neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)
20. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business carried on at the permit premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 829 (Ind. App. 1982).
21. The Commission may issue a beer and wine grocery permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19. *Id.*

22. The phrase "in the nature of the applicant's main business function" as applied in Ind. Code § 7.1-3-1-19 to grocery stores means the retail sale of products typically found in an Indiana grocery store. See *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 832 (Ind. App. 1982).
23. The term "grocery store", in common usage, means a building or structure where groceries are kept for sale. *Goldstine v. State*, 103 N.E.2d 438, 442 (Ind. App. 1952).
24. The word "substantial", as used in Ind. Code § 7.1-3-1-19, means something more than a nominal amount, something more than seeming or imaginary, it does not mean fifty percent (50%) or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).
25. The phrase "in the premises", as used in Ind. Code § 7.1-3-1-19, means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. Ind. Code § 7.1-1-3-20.
26. Where an applicant carries and sells a large number of non-taxable grocery items as well as ordinary household products and miscellaneous items not inconsistent with the sales of a typical grocery store, such sales are substantial within the meaning of the "character of business" test. Ind. Code § 7.1-3-1-19.
27. The Applicant has established that a substantial portion of its business at the proposed permit premises is in the nature of a grocery store.
28. The Applicant has submitted substantial evidence that it meets the "character of business" test for a grocery store and is qualified to hold a Commission Type 115 beer and wine grocery permit.



29. The law does not permit the denial of an alcoholic beverage permit because an applicant sells fuel and oil products. *Kocolene Oil Corporation v. Indiana Alcohol and Tobacco Commission*, Cause No. CV781-322 (1984).
30. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 831 (Ind. App. 1982).
31. To deny the application to Applicant while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.
32. The Local Board denied this application without sufficient evidence to support a finding that this permit should not be issued.
33. A local board's recommendation is clearly erroneous when there is a lack of substantial evidence to support the recommendation. Ind. Code § 7.1-3-19-11.
34. The Commission may decline to follow the recommendation of a local board where the recommendation is not based upon substantial evidence. *Id.*
35. The Applicant has submitted substantial evidence that it is qualified to hold a Commission Type 115 grocery beer and wine permit. (LB Hearing and ATC Hearing).
36. The Commission may reverse a local board's action in denying an application for a permit if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

37. The Local Board's action in denying the application of the permit of this Applicant in this matter was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

38. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to recommend denial of the permit application of the Applicant in this matter was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. It is further Ordered, Adjudged and Decreed that that the evidence adduced at the ATC Hearing was in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant, Ridgeway Petroleum, Inc., 2735 Main Street, Highland, Indiana 46322 for the application of this Type 115 permit no. DL45-23052 is approved, the recommendation of the Local Board in this matter is reversed, and the permit applied for herein is hereby GRANTED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
U-Jung Choe, Hearing Judge

H:\ATC Permits\Permit No. DL45-23052 - Ridgeway Petroleum, Inc\Findings of Fact and Conclusions of Law - DL45-23052 - 2007.11.01.doc

